IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 13696 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHAIKH MAJID SHAIKH RASUL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 13696 of 2004

MS BANNA DUTTAN FOR MR AR SHAIKH for Petitioner No. 1

MRS HB PUNANI, AGP for Respondent No.3

RULE SERVED for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 21/02/2005

ORAL JUDGEMENT

1. By filing this Special Civil Application under Article 226 of the Constitution of India the petitioner has challenged the order of his detention passed by the

Police Commissioner, Surat on 24th July, 2004 in exercise of powers conferred upon him under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 ("PASA Act" for short). The petitioner is under detention as cruel person within the meaning of the PASA Act, from 23rd August, 2004, in pursuance of the above said order of detention passed by the Police Commissioner, Surat City.

2. The grounds of detention as placed on record reveal that the detaining authority relied upon two types of materials to arrive at the subjective satisfaction that the petitioner was a cruel person and was required to be detained under the PASA Act. Firstly, the detaining authority relied upon a crime registered against the petitioner before D.C.B. Police Station vide C.R.No.II-3252 of 2004 on 13th June, 2004 for the offences punishable under Sections 8, 9 and 10 of the Bombay Animal Preservation Act, 1954. The petitioner came to be arrested in the said offence on 22nd June, 2004 and was released on bail on the same day by the competent court. It was alleged that the petitioner was found in possession of 3200 K.G. of mutton of cows, bulls and calves. The petitioner was also found in possession of axes five in numbers, knives six in numbers etc. In fact, one Alpeshbhai Vallabhbhai Chikhalia gave First Information Report before D.C.B. Police Station, Surat in respect of the above materials found from the petitioner. In fact the said Alpeshbhai Vallabhbhai Chikhalia informed the police that on one Tempo bearing No.GJ-5-UU-4955 and the other Tempo bearing No.GJ-7-U-7018, the petitioner and others were transporting mutton of bulls and cows, the police raided both the tempos and found the above said materials. The detaining authority took into consideration the investigation papers in the said crime registered against the petitioner.

3. The detaining authority also relied upon two incamera statements of the witnesses whose identities are not disclosed by the detaining authority claiming privilege under Section 9(2) of the PASA Act. The statements are recorded by the sponsoring authority on 7th July, 2004 and 8th July, 2004 and verified by the detaining authority on 22nd July, 2004. The first witness referred to an incident occurred on 25th April, 2004 wherein the petitioner and his other accomplices approached the witness, when the witness was waiting in the area of Limbayat Police Station along with his goods carriage vehicles. The petitioner and his accomplices stated to the witness that they had loaded one tempo with

mutton of cows, bulls and calves and the said tempo had concealed by them in a field at village Puna. They stated to the witness that the said tempo could not be brought to village Limbayat because there was apprehension that they might be arrested by the police and, therefore, they asked the witness to give his goods carriage vehicle on hire for transporting meat as aforesaid. On refusal by the witness, the petitioner and his accomplices were excited, the witness was caught hold from his collar and was beaten. The witness raised shouts, which attracted a crowd, some persons from the crowd attempted to rescue the witness, but the petitioner and his accomplices with weapons rushed towards the crowd and persons started running helter-skelter. The petitioner and his accomplices also inflicted blows on the vehicles parked nearby. The traffic was disrupted, normal life in the area was disturbed residents of the locality locked themselves in their houses and shop keepers closed their shops, atmosphere of terror and fear was spread in the area.

4. The second witness referred to an incident of 23rd May, 2004, in the evening when the witness was at his house, the petitioner and his accomplices approached the witness. The witness was called out of the house and in aloofness the witness was told by the petitioner and his accomplices that the petitioner had to make payment to Javedbhai Lakhoti and Iliyas Sindhi for cows, bulls and calves which he purchased from them. The petitioner stated the witness to advance him Rs.5,000.00. The witness refused and stated that for such type of act committed by the petitioner, he would not lend him the amount. The petitioner was excited and after getting caught hold of the witness, he was beaten by the petitioner in public. On raising shouts of help by the witness, the crowd was gathered and some of them also tried to intervene and rescue the witness, but the petitioner and his accomplices with the weapons like knives etc. rushed towards the crowd so the persons started running helter-skelter on account of fear. The petitioner and his accomplices while running towards the crowd also damaged vehicles which came in their way. The traffic was disrupted. The residents of the locality locked themselves in their houses, the shop keepers closed their business and the normal life of the locality was disturbed.

5. From the above materials, the detaining authority came to the conclusion that the petitioner was a habitual offender and of cruel mind. The petitioner was of ferocious and dangerous tendency and after forming a gang

through bullying tactics transported meat of cows, bulls and calves within the city precinct of Surat. Whoever objected to the activities of the petitioner, such persons were beaten in the public by the petitioner. On account of fear and terror of the petitioner no citizens dared to file complaints against the petitioner. In view of the detaining authority, the petitioner was cruel person within the meaning of the PASA Act and his activities were prejudicial to the maintenance of the public order. After considering remedial measures available, against the petitioner under the general law, the detaining authority came to the conclusion that the activities of the petitioner were required to be prevented forthwith and, there was no other alternative, except to detain the petitioner under the PASA Act as cruel person. The detaining authority, therefore, passed an order of detention of the petitioner, which is under challenge in this petition.

6. Learned advocate Ms.Banna Dutta for the petitioner and learned AGP Mrs.H.B.Punani for the respondent No.3 were heard at length. Affidavit-in-reply as filed by the detaining authority and placed on record by the learned AGP, is taken into consideration.

7. Out of various grounds mainly urged on behalf of the petitioner, were that the order under question is required to be quashed on the ground of delay in passing the order. It was contended that the offence registered on 13th June, 2004 and the petitioner was arrested on 22nd June, 2004 and was released on bail on the same day. The sponsoring authority recorded the statements of the witnesses on 7th and 8th July, 2004 narrating the incidents of 24th April and 23rd May, 2004. These statements were verified by the detaining authority on 22nd July, 2004 and the order came to be passed on 24th July, 2004 causing delay for about one month in passing the order from the date of registration of the offence. It was also contended that only one solitary offence has been registered against the petitioner. It was also contended that the detaining authority was required to take into consideration, the contents of bail application filed by co-detenu and the order passed thereon. According to the learned advocate for the petitioner, the detaining authority neither relied upon those materials nor copies were supplied to the petitioner. The other contentions about claiming privilege by the detaining authority under Section 9(2) is also raised contending that the contemporaneous record was not relied upon by the detaining authority in claiming privilege under Section 9(2) of the PASA Act.

8. As against that learned AGP contended that there is no delay in passing the order of detention. My attention was drawn to paragraph No.19 of the affidavit-in-reply filed by the detaining authority wherein the detaining authority stated that after recording of the crime against the petitioner, the sponsoring authority collected the material and after recording the statements as aforesaid a proposal was submitted to him on 9th July, 2004. The detaining authority in this affidavit further explained that he verified the contents of the statements calling the witness in his presence on 22nd July, 2004 and verified the statements, thereafter passed the order on 24th July, 2004. Learned AGP, therefore, contended that there is in fact no delay in passing the order and if there be any delay, it is explained in paragraph No.19. So far as the other contentions raised on behalf of the petitioner is concerned, it was replied by the learned AGP that the documents which the detaining authority relied were supplied fully to the petitioner, the bail application of co-detenu filed by such co-detenu before the Court and order passed thereon was not the material relied upon by the detaining authority and the question of supplying such material to the petitioner does not arise at all in respect of solitary offence. The reliance was placed by the learned AGP of the Apex Court in the matter SITTHI ZURAINA BEGUM Vs. UNION OF INDIA AND OTHERS, as reported in AIR 2003 S.C. 323.

9. Having considered rival contentions fully and going through the record and the grounds of detention, it is necessary to observe that in the matter of detention the prime consideration must not loss sight of that the object of detention law is prevention and not the punishment. Keeping this very object in mind whenever preventive action is proposed to be taken, the authority concerned must arrive at subjective satisfaction from the material on record objectively. The prime necessity to detain a person under preventive detention is to weigh liberty of a citizen vis-a-vis activities alleged against him. Therefore, the behaviour or the activities alleged must be carefully scrutinized by the detaining authority, because such behaviour is a core and backbone of the preventive action. The apprehension of the detaining authority concerning the future behaviour of the detenu which might be alleged to be prejudicial to the society must pass through the strict scrutiny of the detaining authority. There must be cogent material before the detaining authority indicating tendency of repeating prejudicial, behaviour of the detenu to the society.

10. It must not also be lost sight of that in the present case, the petitioner is branded as cruel person within the meaning of Section 2(bbb), of the PASA Act. The intention of legislature is very clear from the phraseology used and employed in the statue. It is necessary to reproduce the definition of cruel person as inserted under the PASA Act vide Section 2 of the Amending Act No.16 of 1985, the statue lays down as under:-

> "(bbb) "cruel person" means a person, who either by himself or as member or leader of a gang habitually commits or attempts to commit abets the commission of an offence punishable under Section 8 of the Bombay Animal Preservation Act, 1954 (Bom.LXXII of 1954)"

11. Now going through the provisions of the definition of "cruel person", from bare reading of the same, it becomes clear that the legislature intended such behaviours to be branded as behaviour of a cruel person when such person either by himself or as member or leader of a gang habitually commits or attempts to commit or attempts an offence punishable under Section 8 of the Bombay Animal Preservation Act, 1954. The said Section 8 prescribes penalty for the contravention of the provisions of the said Act and the important provisions in the said Act, are grafted in Section 5 so far as the offence part is concerned whereby slaughtering of animals is made prohibited and restricted and is allowed only on certain conditions. There must be overt behaviour of habitually committing the offences as prescribed under the provisions of Bombay Animal Prevention Act, 1954, on the part of detenu, before he is branded as "cruel person".

12. Habitually committing the offence refers to repetitive tendency of human conduct to commit the same act. It is necessary to refer here to the observations made by the Apex Court in the matter of GOPALANACHARI Vs. STATE OF KERALA, as reported in AIR 1981 S.C. 674, while dealing with terminology like "by habit", "habitual", "desperate", "dangerous, "hazardous" etc. with reference to Section 110 of the Code of Criminal Procedure. The Apex Court observed as under in paragraph No.6.

> "6. Article 21 insists that no man shall be deprived of his life or personal liberty except according to the procedure established by law. In Maneka Gandhi case(l) this Court in clearest terms strengthened the rule of law vis a vis

personal liberty by insisting on the procedure contemplated by Art. 21 having to be fair and reasonable, not vagarious, vague and arbitrary:

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non- arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles, J., called "the justice of the common law".

Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights; observance of fundamental rights is not regarded as good politics and their transgression as bad politics. I sometimes pensively reflect that people's militant awareness of rights and duties is a surer constitutional assurance of governmental respect and response than the sound and fury of the 'question hour' and the slow and unsure delivery of court writ.....

To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available.[(1978) 1 SCC 248 at p.

338 (per Krishna Iyer,J.) : (AIR 1978 SC 597)]

The constitutional survival of s. 110 certainly depends on its obedience to Art. 21, as this Court has expounded. Words of wide import, vague amplitude and far too generalised to be safe in the hands of the Police cannot be constitutionalised in the context of Art. 21 unless read down to be as a fair and reasonable legislation with reverence for human rights. A glance at s. 110 shows that only a narrow signification can be attached to the words in clauses (a) to (g), "by habit a robber....", "by habit a receiver of stolen property....", "habitually protects or harbours thieve....", "habitually commits or attempts to commit or abets the commission of .... ", "is so desperate and dangerous as to render his being at large without security hazardous to the community". These expressions, when they become part of the preventive chapter with potential for deprivation of a man's personal freedom upto a period of three years, must be scrutinised by the court closely and anxiously. The poor are picked up or brought up, habitual witnesses swear away their freedom and courts ritualistically commit them to prison and Art. 21 is for them a freedom under total eclipse in practice. Courts are guardians of human rights. The common man looks upon the trial court as the protector. The poor and the illiterate, who have hardly the capability to defend themselves, are nevertheless not 'non-persons', the trial judges must remember, This Court in Hoskot's case has laid down the law that a person in prison shall be given legal aid at the expense of the State by the court assigning counsel. In cases under s. 110 of the Code, the exercise is often an idle ritual deprived of reality although a man's liberty is at stake. We direct the trial magistrates to discharge their duties, when trying cases under s. 11(), with great responsibility and whenever the counter-petitioner is a prisoner give him the facility of being defended by counsel now that Art. 21 has been reinforced by Art. 39A. Otherwise the order to bind over will be bad and void. We have not the slightest doubt that expressions like "by habit", "habitual", "desperate", "dangerous", "hazardous" cannot be flung in the face of a man with laxity of semantics. The Court must insist on specificity

> of facts and be satisfied that one swallow does not make a summer and a consistent course of conduct convincing enough to draw the rigorous inference - that by confirmed habit, which is second nature, the counter-petitioner . is sure to commit the offences mentioned if he is not kept captive. Preventive sections privative of freedom, if incautiously proved by indolent judicial processes, may do deeper injury. They will have the effect of detention of one who has not been held guilty of a crime and carry with it the judicial imprimatur, to boot. To call a man dangerous is itself dangerous; to call a man desperate is to affix a desperate adjective to stigmatise a person as hazardous to the community is itself a judicial hazard unless compulsive testimony carrying credence is abundantly available. A sociologist may pardonably take the view that it is the poor man, the man without political clout the person without economic stamina, who in practice gets caught in . the coils of s. 110 of the Code, although, we as court, cannot subscribe to any such proposition on mere assertion without copious substantiation. Even so, the court cannot be unmindful of social realities and be careful to require strict proof when personal liberty may possibly be the causality. After all, the judicial process must not fail functionally as the protector of personal liberty."

[Emphases supplied]

13. Now referring to the facts of the present case and the material relied upon by the detaining authority, it is clearly borne out that the detaining authority relied upon two aspects in scrutinizing the behaviour of the petitioner as aforesaid. Out of these two aspects, filing of criminal case against the petitioner for the breach of the provisions of Bombay Animal Preservation Act, 1954 could hardly be said to be a material exhibiting habitual tendency of the petitioner to commit such offences. In view of what is observed by the Apex Court in the above said decision of GOPALANACHARI [supra]. Confusion which is likely to arise at this juncture is whether a solitary crime registered against the detenu is sufficient to warrant action under preventive detention law. It is required to be explained that the question in this case, does not arise whether a solitary crime registered against the detenu is sufficient to detain the petitioner, but question

precisely arises having regard the statutory provisions in the shape of Section 2(bbb) whether merely filing of a case, which is still to be tried, the person can be branded as habitual offender, which is a prime requirement for detention under the PASA Act as a cruel person. On going through the investigation papers thoroughly it is nowhere emanated that the behaviour of the petitioner disclosed through the investigation in the said crime leads to infer that the petitioner was habitual offender within the meaning of Section 2(bbb) of the PASA Act.

14. The act of slaughtering and caused to be slaughtering certain animals as envisaged by the Section 5 of The Bombay Animal Preservation Act is made offence under that Act. The habit of doing such acts repeatedly by way of second nature, as a confirmed conduct may attract rigorous inference of habitually committing the said offences. So far as preventive detention laws are concerned phrases employed like "habitual offender" must not be given any laxity in its application to give facts. In the present case, the crime registered against the petitioner reveals allegations of transportation of meat of certain animals and only evidence against him is in shape of statements of co-accused and co-detenu. Satisfaction of the competent authority must be based on specificity and the rigorous inference must be drawn from such grave material which indicates that by confirmed habit, which is a second nature, the detenu was sure to repeat such offences.

15. In the matter of MUSTAKMIYA JABBARMIYA SHAIKH Vs. M.M. MEHTA, COMMISSIONER OF POLICE AND OTHERS, as reported in 1995 (3) SCC 237, the Apex Court after referring to the decision of Apex Court in the matter of Gopalanachari (Supra), while discussing Section 2(c) of the PASA Act and more particularly dealing with the phraseology of "habitually committing offence" employed therein observed as under in para-8.

> "8. The Act has defined "Dangerous person" in clause (c) of Section 2 to mean a person who either by himself or as a member or leader of a gang habitually commits or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Penal Code or any of the offences punishable under Chapter V of the Arms Act. The expression "habit" or "habitual" has however, not been defined under the Act. According to The Law Lexicon by P. Ramanatha Aiyar, Reprint Edn.

(1987), p.499, 'habitually' means constant, customary and addicted to specified habit and the term habitual criminal may be applied to anyone who has been previously convicted of a crime to the sentences and committed to prison more than twice. The word 'habitually' mean 'usually' and 'generally'. Almost similar meaning is assigned to the words 'habit' in Aiyar's Judicial Dictionary, 10th Edn. p. 485. It does not refer to the frequency of the occasions but to the invariability of practice and the habit has to be proved by totality of facts. It, therefore, follows that the complicity of a person in an isolated offence is neither evidence nor a material of any help to conclude that a particular person is a 'dangerous person' unless there is material suggesting his complicity in such cases which lead to a reasonable conclusion that the person is a habitual criminal. In Gopalanachari v. State of Kerala this Court had an occasion to deal with expressions like "bad habit", "habitual", "desperate", "dangerous", and "hazardous". This Court observed that the word habit implies frequent and usual practice. Again in Vijay Narain Singh v. State of Bihar this Court construed the expression "habitually" to mean repeatedly or persistently and observed that it implies a thread of continuity stringing together similar repetitive acts but not isolated, individual and dissimilar acts and that repeated persistent and similar acts are necessary to justify an inference of habit. It, therefore, necessarily follows that in order to bring a person within the expression "dangerous person" as defined in clause (c) of Section 2 of the Act, there should be positive material to indicate that such person is habitually committing or attempting to commit or abetting the commission of offences which are punishable under Chapter XVI or Chapter XVII of IPC or under Chapter V of the Arms Act and that a single or isolated act falling under Chapter XVI or Chapter XVII of IPC or Chapter V of Arms Act cannot be characterized as a habitual act referred to in Section 2(c) of the Act."

[Emphasis supplied]

16. The other aspects of the material which relied upon by the detaining authority i.e. statements of the witnesses cannot be said to be cogent material to arrive

at subjective satisfaction that the petitioner was a habitual offender within the meaning of PASA Act as envisaged by the provisions of Section 2(bbb). This is so because, the sponsoring authority recorded the statements on 7th and 8th July, 2004 of the incidents occurred on 25th April and 23rd May, 2004. Firstly, though the detaining authority attempted to explain the delay in passing the order of detention but the fact remains that even after committing a crime on 30th June, 2004, the statements came to be recorded by the sponsoring authority only on 7th and 8th July, 2004. The time taken in collection of material by the sponsoring authority is not properly explained. Even if these two incamera statements are taken at their face value, they are unable to lead to draw that rigorous inference that the petitioner, by confirmed habit was committing the offences of slaughtering the animals as envisaged by Section 5 of the Bombay Animal Preservation Act, 1954. In one statement it is alleged that the petitioner demanded a goods carriage vehicle of the witness to transport animal meat, while in second case the petitioner demanded amount from witness for purchasing animals. If these incidents are scrutinized carefully without any concession of laxati, it is clear that the conduct would not fall within the scope of "slaughtering animals or causing such slaughtering or abetting such slaughtering." The thread of continuity in the commission of offence repeatedly and persistently is nowhere found. Thus the material which is in two parts firstly, investigation papers in the said crime and two incamera statements fails to satisfy the test of judicial scrutiny in respect of the detenu being habitual offender within the meaning of Section 2(bbb) of the PASA Act, especially in view of what is stated by the Apex Court in the decision of GOPALANACHARI [supra].

17. The subjective satisfaction, therefore, arrived at by the detaining authority is vitiated. In view of the above discussion and the order passed by the detaining authority which is under challenged in this Special Civil Application is required to be quashed on the grounds discussed above.

18. In the result, the petition is allowed. The order passed by the Police Commissioner, Surat City on 24th July, 2004, against the petitioner in exercise of powers under Section 3(1) of the PASA Act is hereby quashed and set aside. The detenu SHAIKH MAJID SHAIKH RASUL is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule is made absolute. Direct service is

permitted.

[J. R. VORA,J.]

(vijay)